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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Middle District of Alabama, Northern Division, entered on April 5, 1972, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the United States District Court for the Middle District of Alabama, Northern Division, has not yet been reported. It is set out in the Appendix, *infra*, pp. 1a-21a.

Jurisdiction

This action to declare unconstitutional and to restrain the enforcement of Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, insofar as they require different treatment for female as opposed to male members of the uniformed services, originated through a complaint filed by appellants in the United States District Court for the Middle District of Alabama, Northern Division, on December 23, 1970. Pursuant to Title 28 U.S.C. Sections 2282 and 2284, a three-judge district court was convened to hear and determine the action. On April 5, 1972, the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the Middle District of Alabama, Northern Division, on April 26, 1972. App., *infra*, p. 22a.

The jurisdiction of the Supreme Court to review this decision of the United States District Court on appeal is conferred by Title 28 U.S.C. Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

Statutes and Regulations Involved

Title 37 U.S.C. Sections 401 and 403, Title 10 U.S.C. Sections 1072 and 1076, and Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242, are set out in the Appendix, *infra*, p. 23a *et seq.*

Question Presented

Whether the classification according to sex made by Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, which provide "dependency" allowances automatically for the spouse of male members of the uniformed services, whether or not the spouse is in fact dependent on the member for any of her support, but which provide such allowances for the spouse of female members of the uniformed services only upon a showing that the spouse is in fact dependent on the member for more than one-half of his support, violates the due process clause of the Fifth Amendment to the United States Constitution.

Statement of the Case

Appellant Sharron Frontiero joined the Air Force on October 1, 1968, for an obligated period of service of four years. On December 17, 1969, she married appellant Joseph Frontiero, who was and remains a full-time student at Huntington College, Montgomery, Alabama. As stated in the agreed stipulation of fact on the basis of which this action was heard and determined, appellant Joseph Frontiero's total expenses are approximately $354.00 per month. With the exception of $205.00 per month which appellant Joseph

Frontiero receives under the educational provisions of the G.I. Bill and $30.00 per month income from a part-time job, appellant Sharron Frontiero provides the sole support for both appellants.

The provisions of 37 U.S.C. Sections 401 and 403 grant a supplemental housing allowance to armed forces members living off-base (Basic Allowance for Quarters—BAQ), the allowance varying with the number of dependents claimed by the armed forces member. Male members are allowed to claim their spouses as dependents, and hence to gain extra benefits, regardless of their wives' actual financial dependency. The statute sets up a different definition of dependency for female armed forces members, allowing the females to claim their spouses as dependents, and hence gain supplemental benefits, only if the husband is in fact dependent upon the female service member for over one-half of his support.[1]

Sections 401 and 403 as applied to women are supplemented by Department of Defense regulations set out in Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) (App., *infra*, p. 30a). Pursuant to these regulations a male spouse does not qualify as a dependent even if he is in fact dependent upon his wife for more than one-half of his support, unless he is physically or mentally incapable of self-support. Moreover, the regulations provide that "a female member, who voluntarily assumes support of her husband to permit him to attend college . . . is not considered to have a husband who is in fact dependent upon her . . . ."

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[1] Maxwell Air Force Base (MAFB) does not provide any base housing for the families of married female members of the Air Force. Complaint, para. III (2).

In the fall of 1970, after consulting with her commanding officer and a representative of the Base Legal Office, appellant Sharron Frontiero advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional housing allowance that would have been granted automatically to males with spouses. Col. Jernigan informed her that the regulations prohibited such allowances. In November, 1970, pursuant to the advice of a member of the Inspector General's staff, MAFB, appellant Sharron Frontiero submitted a formal complaint. Approximately one week thereafter, appellant Sharron Frontiero was informed that the complaint had been reviewed and that she was ineligible for any housing allowance.

Under Title 10 U.S.C., Sections 1072 and 1076, the wife and children of military personnel are entitled to comprehensive medical benefits, regardless of their potential or actual income. However, the husband of a female member of the Armed Forces is not entitled to any medical benefits unless he is "in fact dependent upon" the female member for more than one-half of his support. (*See* App., *infra*, pp. 27a-29a.) Appellant Sharron Frontiero seeks extension of these benefits to her spouse, appellant Joseph Frontiero.

On December 23, 1970, appellants filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, asserting that the distinctions drawn by these statutes and regulations, insofar as they required different treatment for female and male members of the uniformed services, arbitrarily and unreasonably discriminate against appellants and therefore violate the due process clause of the Fifth Amendment to the United States Constitution.

Over the dissent of Judge Johnson, the district court held that "the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and . . . are in all respects constitutional." App., *infra*, pp. 15a-16a. In arriving at its decision the Court below declared that:

> . . . [T]his Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end. App., *infra*, p. 9a.

The Court found the necessary "rational connection" by relying upon Congress' conclusive presumption in favor of married servicemen, the purpose of which was "to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them." App., *infra*, p. 10a.

Appellants appeal from this decision by the three-judge district court.

The Question Is Substantial

Title 10 U.S.C. Sections 1072 and 1076, and Title 37 U.S.C. Sections 401 and 403, classify spouses of male uniformed services members as "dependents" whether or not they are in fact; these same sections classify spouses of female members as "dependents" only if the husband is in fact dependent on his wife for more than one-half of his support. Further, regulations issued pursuant to these statutes disqualify even wholly dependent spouses of fe-

male members unless they are mentally or physically incapable of self-support. App., *infra*, p. 30a. Underscoring the stark double standard embodied in this scheme, the regulations state explicitly that a servicewoman who assumes support of a husband attending college does not have a dependent spouse; a serviceman whose wife is capable of self-support but spends her days attending college continues automatically to receive full dependency allowances. App., *infra*, p. 30a.

This sex-based classification, established for a purpose unrelated to any biological difference between the sexes, violates the due process clause of the Fifth Amendment for it arbitrarily and capriciously discriminates against women as a class.[2] *Reed* v. *Reed*, 404 U.S. 71 (1971).

It is beyond debate that the concept of equal protection forbids not only racial discrimination but discrimination against other groups set apart by unalterable conditions of birth that are unrelated to individual capacity. *Weber* v. *Aetna Casualty and Surety Co.*, 40 U.S.L.W. 4460, 4463 (U.S. Apr. 24, 1972); *Reed* v. *Reed, supra; Graham* v. *Richardson*, 403 U.S. 365, 371-74 (1971).

In determining whether a particular statute or governmental action violates the concept of equal protection, the courts have developed standards of review ranging from

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[2] The Fifth Amendment's due process clause imposes no less an obligation upon the federal government than the Fourteenth Amendment's equal protection clause does upon the states. *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). *See also* Brief for Appellee at 28, *Welsh* v. *United States*, 398 U.S. 333 (1970) (federal government's affirmation that "equal protection" notion, implicit in the Fifth Amendment, precludes Congress from acting arbitrarily . . . or from engaging in invidious discrimination).

lenient to stringent. *See Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969). In some cases a test of reasonable classification has been applied: does the classification established by the legislature bear a reasonable relation to the permissible objective of the legislation? Under this general test, if the purpose of the statute is permissible and if the statutory classification bears the required fair relationship to that purpose, the constitutional requirement will be satisfied. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

In two circumstances a more stringent test is applied. When the "statutory classifications approach sensitive and fundamental personal rights," *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 667, 670 (1966), or when the statute classifies on a basis "inherently suspect," the courts will subject the legislation to the most rigid scrutiny. Thus, a statute distinguishing on the basis of race or ancestry embodies a "suspect or invidious" classification and, unless supported by the most compelling affirmative justification, will not pass constitutional muster. *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Sei Fujii* v. *State,* 38 Cal.2d 718, 730, 242 P.2d, 617, 625 (1952).

A third, intermediate standard of review was applied in *Bullock* v. *Carter,* 40 U.S.L.W. 4211, 4214 (U.S. Feb. 24, 1972). Mr. Chief Justice Burger, writing for the majority, declared that an inequity challenged under the equal protection principle "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."

Appellants' position in this case is three-fold: (1) the sex line drawn by 37 U.S.C. Sections 401 and 403, and 10 U.S.C.

Sections 1072 and 1076, establishes a suspect classification for which no compelling justification can be shown; alternatively (2) the sex line at issue, closely scrutinized, is not reasonably necessary to the accomplishment of legitimate government objectives; and, finally (3) without regard to the suspect or invidious nature of the classification, the line drawn by Congress, distinguishing servicewomen from servicemen, lacks the constitutionally required fair and reasonable relation to a permissible congressional objective.

I.

a. The majority below considered the "reasonable relationship" test applicable and upheld the statutory and regulatory scheme on the ground that it served the purpose of "administrative convenience." In the majority's words:

> Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependence than to extend the presumption of dependency to such members. . . . App., *infra,* p. 11a.

The majority plainly stated the basis of its selection of the most lenient standard of review. The court thought that under *Reed* a lower court "would be remiss" in subjecting sex-based classifications to closer scrutiny. See App., *infra,* p. 9a n.2. Overlooked was Mr. Justice Brennan's explanation in *Eisenstadt* v. *Baird,* 40 U.S.L.W. 4303, 4306 n.7 (U.S. Mar. 22, 1972), that the Court in *Reed* did not reach the question whether a stricter standard should be applied in sex discrimination cases because the Idaho statute at issue there "fail[ed] to satisfy even the more

lenient equal protection standard." Thus, this Court's reservation of the standard question for another day was misread as a mandate to lower courts to apply a lenient test in cases challenging sex-based classifications.[3]

b. In the administration of public affairs, convenience is a virtue so long as it does not supersede the fundamental right of individuals to even-handed application of governmental action. But the policy embodied in the statutes and regulations at bar is applied in a way which is grossly unfair to women.

The median income of a man in the armed forces is $3683 per year.[4] The median earnings of civilian women working full time is $5323 per year.[5] Therefore, it is likely that most men serving in the armed forces who are married to working women[6] earn less then their wives and under

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[3] The decision of the court below is typical of the confusion exhibited by many lower courts, both state and federal, as to the proper standard of review in sex discrimination cases. See, *e.g.*, *Miskunas* v. *Union Carbide Corp.*, 399 F.2d 847 (7th Cir.), *cert. denied*, 393 U.S. 1066 (1968); *Eslinger* v. *Thomas*, 324 F. Supp. 1329 (D.S.C. 1971); *Duley* v. *Caterpillar Tractor Co.*, 411 Ill.2d 15, 253 N.E.2d 373 (1969); *Jacobsen* v. *Lenhart*, 300 Ill.2d 225, 195 N.E.2d 638 (1968); *DeKosenko* v. *Brandt*, 63 Misc.2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970); *Goldblatt* v. *Board of Education*, 52 Misc.2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc.2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968).

[4] THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE, Table 5-I at p. 51, Table A-II at p. 181 (1970).

[5] U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Fact Sheet on the Earnings Gap 1 (December, 1971) (median for 1970).

[6] Almost three-fifths of all women workers are married and living with their husbands; forty-six percent of all married women whose husbands earn between $5,000 and $6,999 are in the labor force. U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Women Workers Today 4 (1971).

the standard suggested below by appellees,[1] such men would be dependent on their wives. Any even-handed pursuit of a dependency criterion would distinguish between military men whose wives are gainfully employed and those whose wives are not, and require the former to prove the dependency of their spouses in the same way that women in the uniformed services are now required to prove the dependency of theirs.

c. While this Court left open the question of the appropriate standard of review in sex discrimination cases, the decision in *Reed* spoke directly to "administrative convenience" as a basis for establishing the rationality of sex-based classifications: "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . ." 404 U.S. at 76-77. As Judge Johnson stated in his dissent in the case at bar:

> The basic message which comes from [the *Reed* case] is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. App., *infra*, p. 20a.

In the case at bar, as in *Reed*, acceptance of the administrative convenience rationale would require approval of sex-role stereotyping as a legitimate basis for legislative distinction. As this Court has recognized, resort to group stereotype as a basis for legislative line-drawing is wholly at odds with the principle of equality of individuals before the law. In *Stanley* v. *Illinois*, 40 U.S.L.W. 4371 (U.S. Apr.

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[1] Defendant's Memorandum Brief at pp. 9-10, *Frontiero* v. *Laird*, —— F. Supp. —— (M.D. Ala. 1972).

3, 1972), this Court declared unconstitutional legislation based on the administratively convenient assumption that unwed fathers do not wish responsibility for children. Significantly, in *Stanley*, the barrier was not "insurmountable," for under the legislation at issue there an unwed father could affirmatively prove his qualification in an adoption or guardianship proceeding. But the Court held that he should not be subjected to a standard more onerous than that applicable to other parents. Similarly, in the case at bar a married female member of the uniformed services should not be held to a requirement more onerous than that applicable to a married male member of the uniformed services.

Since a classification based on an administratively convenient group stereotype cannot rank as a fair and reasonable method in pursuit of a permissible legislative objective, the decision below founders under the test applied in *Reed* and similarly should be struck down.

II.

The conclusion of the majority of the district court "that there is a rational basis for the different treatment accorded male and female members [of the uniformed services]," App., *infra*, p. 15a, rests on the very kind of double standard this Court rejected in *Reed*. Assuming, *arguendo*, that the district court correctly construed the "rational relationship" test, the court was remiss in failing to go on to scrutinize the legislative scheme more closely: it should have identified sex as a "suspect" criterion and determined whether any "compelling state interest" justifies the classification.

A clear statement of the basis of the suspect classification doctrine has been provided by the California Supreme

Court in a decision declaring that sex falls squarely within the scope of the doctrine:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classification is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . *Sail'er Inn, Inc.*, v. *Kirby*, 5 Cal.3d 1, 18, 485 P.2d 529, 540 (1971).

See also Note, Are Sex-Based Classifications Constitutionally Suspect? 66 Nw. U. L. Rev. 481 (1971).

The kind of classification at issue here should be subject to the same strict scrutiny as an analogous race classification. For example, a police department that required a high school diploma as a prerequisite to admission into its police academy would not be permitted, on the basis of the statistical fact that a lower percentage of blacks than whites have completed high school, to ask only black applicants about their educational background.[8]

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[8] The observation of the California Supreme Court in *Sail'er Inn, supra*, that women as a class "are relegated to an inferior legal status" is amply illustrated by their treatment in the uniformed services. Apart from the discrimination in allowances once women enter the military, they are subjected in the first instance to a statutory quota drastically limiting their opportunity for entry. *See* Title 10 U.S.C. Section 8215 (women enlistees and officers may not constitute more than 2% of the Regular Air Force). For other qualifications applied to women but not to men, *see* AIR FORCE MANUAL 36-5, Dept. of Air Force, sections 2-2(n), 2-13(d)(2), 3-1(a)(19) (September 30, 1970).

III.

At the very least the court below should have applied a standard similar to the one delineated by this Court in *Bullock* v. *Carter, supra.* It is well documented that sex discrimination permeates society at every level and is often reinforced by government sanction.[9] Statutes benefiting men in ways that women are not benefited should be "closely scrutinized" with the burden on the proponent of discrimination to establish that the sex-based classification is "necessary to the accomplishment of legitimate government objectives." Applying this standard, it should be clear that the sex distinction involved in the scheme here at issue "do[es] not pass constitutional muster."

IV.

The court below thought it would face a "Hobson-like choice" in fashioning a remedy if it determined that the sex classification did not comport with the equal protection principle. Should it extend housing and medical benefits to the husbands of servicewomen, or should it require servicemen to prove actual dependency of their wives? This Court's decisions should have made the appropriate resolution evident. For example, in *Levy* v. *Louisiana,* 391 U.S. 68 (1968) and *Weber* v. *Aetna Casualty and Surety Co., supra,* where dependency definitions singled out a certain group for unconstitutional treatment, the Court saved the statutes by striking the offending disqualification, thus extending to the plaintiffs the benefits accorded the larger group similarly situated. Nor is the propriety of extension of benefits a recent judicial discovery. As succinctly stated

[9] See Brief for Appellant, *Reed* v. *Reed, supra,* pp. 69-88.

by Mr. Justice Brandeis over four decades ago in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1939), the legislature eventually may decide to remove the benefit from all, but in the meantime, the court must extend it to the unconstitutionally excluded class. *See also* Mr. Justice Harlan's concurring opinion in *Welsh* v. *U. S.*, 398 U.S. 333, 344, 355-67 (1970). The remedial route in this case is charted with particular clarity since the legislative history irrefutably establishes that these benefits were intended to "create and maintain high morale" among men and women in the armed forces. App., *infra*, p. 5a.

V.

The majority below characterized the claim of women for benefits granted to similarly situated men as a plea for a "windfall." App., *infra*, p. 12a. As Judge Johnson noted in his dissent [citing *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958)], the "windfall" characterization smacks of the long-discredited right-privilege dichotomy." App., *infra*, p. 21a. This Court repeatedly has held that statutorily created benefits must be distributed with an even hand. See *Levy* v. *Louisiana, supra; Weber* v. *Aetna Casualty & Surety Co., supra.*[10]

VI.

The recent overwhelming approval of the Equal Rights Amendment to the United States Constitution, confirming

[10] It might be worth considering whether the "windfall" argument would have held any appeal for the court below had the group excluded from the "windfall" been defined in terms of race, religion or national origin.

the dominant intent of Congress to bar sex discrimination, does not in any way affect protection against such discrimination already afforded by the Fifth and Fourteenth Amendments.

The final approval of the Equal Rights Amendment by Congress on March 22, 1972, is of particular significance to the claim asserted by appellants. In the course of the debate on the Amendment, Congress made clear that enlightened construction and application of the Fifth and Fourteenth Amendments would amply secure equality of rights and responsibilities between the sexes. Nonetheless, Congress wished to provide further assurances so there would not be the slightest doubt that the right of all persons to equal treatment under the law without any distinction as to sex would be recognized as fundamental constitutional principle.[11] Representative Martha Griffiths, on the day the House of Representatives passed the Equal Rights Amendment for the first time, stated:

> There never was a time when decisions of the Supreme Court (under the Fifth and Fourteenth Amendments) could not have done everything we ask today. 116 Cong. Rec. H7953 (daily ed. August 10, 1970).

In Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 676 (1971), two legal scholars examined the record of the judiciary in sex discrimination cases; they concluded that the performance of American judges in this area "can be suc-

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[11] *Cf.* 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1939 (5th ed. 1891): "(T)he repetition of securities (for individual rights) may well be excused so long as the slightest doubt of their having been already sufficiently declared shall anywhere be found to exist."

cinctly described as ranging from poor to abominable. With some notable exceptions . . . [judges] have failed to bring to sex discrimination cases those virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . . Judges have largely freed themselves from patterns of thought that can be stigmatized as 'racist'. . . . [But] 'sexism'—the making of unjustifiable assumptions about social roles solely on the basis of sex differences—is as discernible in contemporary judicial opinions as racism ever was." The majority decision below ranks with the catalogue described in Johnston and Knapp.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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Opinion and Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 3232-N

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Plaintiffs,

VS.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Before RIVES, *Circuit Judge,* and JOHNSON and MCFADDEN, *District Judges.*

RIVES, *Circuit Judge,* and MCFADDEN, *District Judge*:

Plaintiffs attack the constitutionality of 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, insofar as these statutes require different treatment for male as opposed to female members of the uniformed services, and seek to require the defendants to cause plaintiff Lt. Sharron A. Frontiero to receive the same quarters allowance and medical and dental

benefits for her spouse as a male member would receive for his spouse.

"Dependent" is defined in 10 U.S.C. § 1072 and 37 U.S.C. § 401. The statutes provide that dependents of any member of the uniformed services be furnished medical and dental care (10 U.S.C. § 1076) and that members with dependents receive an increased allotment for quarters (37 U.S.C. § 403). Under the statutes, members are allowed to designate a particular person as a dependent in the following instances:

(1) A married male member may claim his wife and any unmarried, legitimate, minor children regardless of whether those persons are dependents in fact.

(2) A married female member may claim her husband and any unmarried, legitimate, minor children upon a showing that they are in fact dependent on her for more than one-half of their support, except that, as to medical and dental care a female member may claim such minor children as dependents without regard to whether they are in fact dependent.

(3) Upon a showing of actual dependency any member may claim adult children, parents, and parents-in-law who are incapable of self support because of mental or physical incapacity.

The crucial difference between the treatment of male and of female members is that with respect to quarters' allowance and medical benefits for the spouse of a female member there must be a showing of actual dependency, whereas this showing is not required for male members.

Plaintiffs seek a declaration that this differentiation is unconstitutional and constitutes a discrimination in viola-

tion of the Due Process Clause of the Fifth Amendment to the United States Constitution; a permanent injunction against the enforcement of these provisions with respect to them and members of their class; and an award of back pay for dependency allowances previously denied Lt. Frontiero.

This case is before the Court for decision upon an agreed statement of facts consisting of a stipulation filed May 20, 1971, and an amended stipulation filed May 24, 1971.

Plaintiff, First Lieutenant Sharron A. Frontiero, USAF, a physical therapist assigned to Maxwell Air Force Base Hospital, Maxwell Air Force Base, Alabama, is married to plaintiff Joseph Frontiero, a full-time student at Huntingdon College, Montgomery, Alabama. Joseph Frontiero's living expenses, including his share of household expenses total approximately $354.00 per month. He receives $205.00 per month in veterans' benefits. It is clear, therefore, that Joseph Frontiero is not dependent on Lt. Sharron A. Frontiero for more than one-half of his support. Accordingly, Lt. Frontiero's requests for quarters allowance and medical benefits have been denied. Before reaching the merits of plaintiffs' claim, two preliminary matters must be decided.

First, defendants contend that plaintiffs have no standing to maintain this action because Joseph Frontiero has previously claimed Sharron A. Frontiero as a dependent for purposes of certain veterans' benefits. Defendants rely on *Fahey* v. *Mallonee*, 332 U.S. 245, 255 (1947), where the United States Supreme Court said:

> . . . It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important

conditions." *United States* v. *San Francisco*, 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

In *Fahey*, the conflicting claims involved only one Act. Defendants contend, however, that the statutory schemes here in question, and the veterans' benefits provisions under which Mr. Frontiero claimed Lt. Frontiero as a dependent, are sufficiently similar in nature that the announced rule in *Fahey* ought to apply.

The provisions under which Joseph Frontiero receives his veterans' benefits are found in 38 U.S.C. §§ 1651, *et seq.* Section 1651 provides:

> The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

The statutory scheme under which Joseph Frontiero receives veterans' benefits is part of Chapter 34 which is de-

nominated as "Veterans' Educational Assistance" and which is in turn a part of Title 38, entitled "Veterans' Benefits."

Title 37 U.S.C., wherein lie the schemes here challenged by Lt. Frontiero, is styled "Pay and Allowances of Uniformed Services." Title 37 does not contain an elaborate statement of purpose, but it is clear that Chapter 7, of which Section 403 is a part, is intended to confer certain benefits on current members of the uniformed services. And, Title 10 U.S.C. § 1071 provides:

> The purpose of sections 1071-1087 of this title is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.

The statute under which Joseph Frontiero receives $205.00 per month is primarily designed to provide assistance to veterans, although one of its stated purposes is to enhance service in the armed forces. On the other hand, 37 U.S.C. § 403 and 10 U.S.C. § 1072 concern benefits to be bestowed upon present and certain former members of the uniformed services, and the stated purpose in Section 1071 is the creation and maintenance of high morale among present members. Therefore, we conclude that the provisions of 38 U.S.C. §§ 1651, *et seq.*, relating to veterans' educational benefits, and 37 U.S.C. § 403 and 10 U.S.C. § 1072, relating primarily to benefits for present members, are sufficiently distinct as to render the *Fahey* doctrine inapposite.

Second, defendants ask this Court to invoke an estoppel doctrine, relying primarily on *Holly Hill Citrus Growers' Ass'n* v. *Holly Hill Fruit Products, Inc.*, 75 F.2d 13, 17 (5th Cir. 1935), where the Court said:

> There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did.

Defendants contend that because Joseph Frontiero has claimed Sharron Frontiero as a dependent for the veterans' benefits, plaintiffs are estopped from claiming him as her dependent under the military pay and allowances statutes.

We do not agree. The amount of the educational assistance allowance for veterans is based upon the number of dependents of the recipient. 38 U.S.C. § 1682. The definition of "dependent" in the Veterans' Benefits Act (38 U.S.C. § 1652) includes the wife of an eligible veteran without regard to her dependence in fact. When Joseph Frontiero claimed his wife as a dependent for the veterans' benefits, he was not warranting her dependence in fact. Rather, he was merely certifying that he was married and that, by the terms of the statute, he therefore had a dependent. In this case plaintiffs ask that the presumption of dependency be extended to female members claiming their husbands as dependents for purposes of medical benefits and quarters' allotment. If such relief were granted the effect would be to excise any notion of dependency in fact from the statutory scheme. As such the force of the statute would be to

give additional pay to all married members without regard to the actual dependency of their spouses. In that light there would be nothing inconsistent in Joseph Frontiero's claiming Sharron as a dependent while at the same time Sharron claimed Joseph. Thus, we conclude that plaintiffs have not taken such an inconsistent position that they are estopped by the *Holly Hill,* doctrine.

Inasmuch as we reject the argument that plaintiffs lack standing and are estopped to challenge the provisions under scrutiny, the case is ripe to be disposed of on the merits.

Plaintiffs point out that a male member may claim his wife without proving her actual dependency, while a female member must prove such in order to claim her husband. At first blush, then, the statute seems to draw a classification entirely on the basis of sex. Such is not the case. Rather than focus attention solely to the different treatment afforded male and female members claiming their respective spouses, we must examine the over-all statutory scheme. A conclusive presumption of dependency is extended in the following instances:

(1) *To male members* claiming spouses and unmarried, legitimate, minor children; and

(2) *to female members* claiming unmarried, legitimate, minor children for purposes of medical and dental benefits.

On the other hand, dependency in fact must be shown:

(1) *By male members* claiming adult children, parents, and parents-in-law; and

(2) *by female members* claiming anyone other than an unmarried, legitimate, minor child for medical and dental benefits.

Thus, on the whole the availability of the presumption does not turn exclusively on the basis of the member's sex but rather on the nature of the relationship between the member and the claimed dependent.[1] In some circumstances male and female members are afforded benefit of the presumption. In others no member can utilize the presumption. As such, this Court is of the view that the statutory scheme as a whole does not differentiate invidiously on the basis of sex. Perforce, then, there is no abridgment of the Constitution.

Yet even if we were to view this case in the narrow context invited by plaintiffs' approach, viz., the different treatment accorded a male member claiming his wife as a dependent and a female member claiming her husband, we would uphold the statute. Before moving to that discussion, however, it is necessary to clarify the standards by which we judge the statute.

An Act of Congress carries with it a strong presumption of constitutionality and places the burden upon the challenging party to prove the unconstitutionality of the statute at issue. See *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 808-809 (1969); *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). The Due Process Clause of the Fifth Amendment, on which this challenge is based, bars federal legislation embodying a baseless classification. *Galvan* v. *Press*, 347 U.S. 522 (1954). Undoubtedly there is much similarity between the equal protection test which courts employ in determining the validity of a state statute and the due process test which is utilized in evaluating a

[1] We have concluded that Congress chose to employ a presumption of dependency in certain instances for reasons of administrative and economic convenience. That such a justification is sound is treated *infra* pp. 11a-13a.

federal statute. Indeed, it seems sound to say that if a statute comports with notions of equal protection it also satisfies the requisites of substantive due process. And in at least two cases the Supreme Court has tested federal statutes in terms of the standards made applicable to state acts through the equal protection clause of the Fourteenth Amendment. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *District of Columbia* v. *Brooke*, 214 U.S. 138 (1909). Thus, in determining the constitutionality of the statutory scheme which plaintiffs attack, this Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end.[3] In making that judgment, the statute must be upheld "if any state of facts rationally justifying it is demonstrated to *or perceived by* the courts." *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970) (challenge to a federal tax statute) (emphasis supplied).

The Supreme Court has recently enunciated the test for determining whether a classification squares with the Equal Protection Clause of the Fourteenth Amendment:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis,"

[3] In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court was faced with a challenge to a state law which allegedly discriminated on the basis of sex. In stating the test by which to judge that statute, the Court did not require that it meet the compelling interest test, see Shapiro v. Thompson, 394 U.S. 618 (1969), but rather that it satisfy the rational connection standard. Similarly, in this case we would be remiss in applying the compelling interest test.

> it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . . ."

Dandridge v. *Williams*, 397 U.S. 471, 485 (1970).

In summary, the law is well-settled that a statutory classification, challenged as an unlawful discrimination, should be upheld if it has a rational basis.

The defendants contend that the statutory provisions here at issue do no more than establish a conclusive presumption that a married male member of the uniformed services has a dependent wife while requiring a married female member of the uniformed services to prove the dependency of her husband, a distinction which, they say, "does no more than take account of facts which the courts and statistical studies evidence in no way discriminates [sic] against females, as such." It seems clear that the reason Congress established a conclusive presumption in favor of married service men was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. The question presented here then is whether the price for enjoying this administrative benefit fails to justify the different treatment of married service women.

The legislative purpose of the provisions of 37 U.S.C. § 403 is to reimburse members of the uniformed services for the expense of furnishing shelter to their dependents. See *Adams* v. *United States*, 65 F.Supp. 86 (Ct. Cl. 1946). Similarly, the object of 10 U.S.C. § 1076 is to provide medical and dental care to dependents of members of the uniformed service. The classification which establishes a conclusive presumption in favor of married service men claiming wives allows the uniformed services to carry out these statutory purposes with a considerable saving of administrative expense and manpower. Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members.[3] Such a presumption made to facilitate administration of the law does not violate the equal protection guarantee of the Constitution if it does not unduly burden or oppress one of the classes upon which it operates. See *Adams* v. *City of Milwaukee*, 228 U.S. 572 (1913). "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966) (dictum). Nothing in the instant statutory classification jeopardizes the ability of a female member to obtain the benefits intended to be bestowed upon her by the statutes. The classification is burdensome for a female member who is not actually providing over one-half the support for her claimed husband only to the extent that were she a man

[3] It should be remembered that for purposes of medical and dental benefits the presumption of dependency is extended to a female member claiming any unmarried minor, legitimate children. And on the other hand a male member must prove actual dependency when he claims adult children, parents, or parents-in-law who by reason of incapacity are unable to support themselves.

she could receive dependency benefits in spite of the fact that her spouse might not be actually dependent, as that term has been defined by Congress. In other words, the alleged injustice of the distinction lies in the possibility that some married service men are getting "windfall" payments, while married service women are denied them. Sharron Frontiero is one of the service women thus denied a windfall.

All dependency benefits are unquestionably valuable, windfalls or not, but we are of the opinion that the incidental bestowal of some undeserved benefits on male members of the uniformed services does not so unreasonably burden female members that the administrative classification should be ruled unconstitutional. Under the stipulated facts, a contrary finding would be unjustifiably broad; it would necessarily be predicated on the reasoning that any classification established to enhance administration of the laws must operate with complete accuracy, that is, without providing any windfalls that are not equally available to members of all classes. The dilemma such a sweeping rule would produce is illustrated dramatically in the instant situation. The Court would be faced with a Hobson-like choice in fashioning a remedy: either strike down the conclusive presumption in favor of married service men, forcing the services to invest the added time and expense necessary to administer the law accurately, or require the presumption to be applied to both male and female married members, thereby abandoning completely the concept of dependency in fact upon which Congress intended to base the extension of benefits.

But the Congress is under no such strict constitutional mandate as it attempts to organize and supervise an efficient and beneficent national government:

> A classification having some reasonable basis does not offend [equal protection] merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Morey v. *Doud*, 354 U.S. 457, 463 (1957), *quoting Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). See *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463 (1941). Nor does the equal protection guarantee of the Constitution steadfastly demand the impracticable. *Perley* v. *North Carolina*, 249 U.S. 510 (1919). *Accord, Dandridge* v. *Williams*, 397 U.S. 471 (1970). Similarly, due process does not command absolute equality.

This is not to say that if plaintiffs could prove that the rational basis—administrative and economic convenience—did not exist due process would nevertheless be satisfied. *Tot* v. *United States*, 319 U.S. 463 (1943). But the plaintiffs here have not come close to proving such a state of facts. There is no evidence before this Court proving that so many male members are in fact dependent on their wives as to make it advisable to deny male members the presumption of dependency. Nor is there proof that so many female members have dependent husbands as to justify extending the benefit of the presumption to them. We take no position on the effect of such a factual showing, particularly in light of our above-stated rationale that the statutory scheme considered as a whole does not differentiate invidiously on the basis of sex, but merely point out that the absence of such proof weakens plaintiffs' case.

Moreover, the result we here reach is clearly in harmony with the recent Supreme Court decision in *Reed* v. *Reed*, 404 U.S. 71 (1971), to strike down, as violative of the

Equal Protection Clause of the Fourteenth Amendment, an Idaho statute which discriminated against women. The statute there in question established a conclusive presumption that the father of a deceased child is more suitable than the mother to serve as administrator of the child's estate. The Supreme Court held that such a classification had no lawful justification:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated *solely* on the basis of sex.

Id. at 76 (emphasis supplied). As we have noted the classification here at issue is not drawn solely on the basis of sex, as was the case in *Reed*. Second, while there is arguably some similarity between the administrative advantage of avoiding probate hearing and the administrative benefit of not having to determine the actual dependency of over a million service wives, there is a significant qualitative distinction. In *Reed* there was a statutory presumption which had no relation to the statutory pur-

pose of selecting the best qualified administrator. The effect was to exclude certain qualified females from serving as administrators, whereas the classification presented here does not exclude qualified female members. They merely have to show actual dependency.

This Court would be remiss if it failed to notice, lurking behind the scenes, a subtler injury purportedly inflicted on service women as a subclass under these statutes. That is the indignity a woman may feel, as a consequence of being the one left out of the windfall, of having to traverse the added red tape of proving her husband's dependency, and, most significantly, of being treated differently. The Court is not insensitive to the seriousness of these grievances, but it is of the opinion that they are mistaken wrongs, the result of a misunderstanding of the statutory purpose. The classifications established by these statutes are purely administrative and economic ones, which are only based in part on sex. There is no reason to believe that the Congress would not respond to a significant change in the practical circumstances presumed by the statutory classification or that the present statutory scheme is merely a child of Congress' "romantic paternalism" and "Victorianism." See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

Having concluded that the statutory scheme on a whole is not one which classifies on the basis of sex and that there is a rational basis for the different treatment accorded male and female members in the narrow context of their attempt to claim spouses, we are compelled to the conclusion that the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and that

they are in all respects constitutional. The relief prayed for is therefore denied.

Done this the 5th day of April, 1972.

RICHARD T. RIVES
United States Circuit Judge

.....
United States District Judge

FRANK H. MCFADDEN
United States District Judge

JOHNSON, *District Judge*, dissenting:

Since the majority depicts this case as it does, the conclusion it reaches is not only easy, it is foregone. However, I am in basic disagreement with the majority's characterization of this litigation and the judicial approach which is thus required.

As an initial point, I take issue with the majority's conclusion that the classification under attack here is not based solely on sex. The majority says that one cannot look merely to the challenged provisions; rather the entire statutory scheme must be examined. Since in some other areas of the statutory scheme men and women are treated equally, the majority argues that the scheme as a whole is acceptable. But simply because a series of related statutes is sexually nondiscriminatory does not necessarily mean that the part of the statutes here being challenged is nondiscriminatory. The fact that the dependency of minor children for purposes of medical and dental care, for example, is determined equally for men and women has

nothing to do with whether the distinction made between men and women with regard to the dependency of their spouses is constitutional.

This Court recognizes that the challenged statutes and regulations are part of a comprehensive statutory matrix. This is so whether the provisions were passed simultaneously or were enacted intermittently over a long period of time. Yet the fact that those provisions which differentiate between men and women are part of such a statutory framework does not *ipso facto* rid those distinctions of constitutional infirmity. To emphasize, because a statute is constitutional in one respect does not preclude an examination into whether some other facet is constitutional. In other words, the majority's excursion into other aspects of these statutes is irrelevant to the issue in this case.

The plaintiffs' case deals solely with the precise question of whether Congress may legitimately distinguish between men and women in the manner in which their spouses' dependency is established. Rather than taking the traditional judicial approach of narrowing the issue, the majority expands the context of this case all out of proportion to the plaintiffs' complaint. Consequently, the majority's approach is not only illogical but is contrary to established notions of judicial perspective.

The majority further concludes that even within the narrow confines of plaintiffs' actual case, the challenged differentiation between men and women is constitutionally permissible. This determination is premised on a finding of "administrative convenience." Without consideration of the propriety of disposing of an important constitutional issue on a basis which no party has advanced and with regard to which we have no proof, I am forced to conclude that this second argument is as faulty as the first.

The majority argues that the reason for providing a conclusive presumption of dependency for males was a desire by Congress to avoid the administrative imbroglio of requiring actual proof from some 200,000 officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. Yet plaintiffs in this case do not attack nor do they seek to end the presumption in favor of males. Rather, they take issue with the statutes' requirement that they and members of their class demonstrate actual dependency. Plaintiffs would probably concede that there is some administrative convenience in granting all married servicemen the conclusive presumption that their spouses are dependent. But except to the extent that it is necessary to illustrate the disparity of treatment between men and women, plaintiffs have demonstrated no concern whatever for the statutes' treatment of males. It is the discriminatory application of the statutes to females that is the crux of this action.

If it is administratively convenient to provide a conclusive presumption for men, it is inconsistent to require a demonstration of dependency in fact for women. The administrative convenience, supposed or real, in providing men with a conclusive presumption of dependency is simply irrelevant to this case. The question is whether it is administratively convenient to require women to demonstrate dependency in fact. From the majority's reasoning, the answer must be clearly in the negative because it is easier just to grant the presumption. Thus, on the strength of the majority's logic, there can be no rational basis.

It may be that the majority attaches a broader meaning to administrative convenience than simply the ease or cost of distribution of benefits. It appears that the majority

would include the denial of benefits to women whose husbands are not dependent in fact in the determination of costs to the Government. Yet it seems incongruous to say that the justification for denying the benefits is that it is cheaper not to give them. That reasoning begs the question of whether there is a rational basis for distinguishing between men and women. If all that is required to uphold a congressional enactment is the conclusion that it is more economical to deny benefits than to extend them, then any statutory scheme can be established and no disqualified group can complain.

Even assuming the correctness of the majority view that administrative convenience may properly include the denial of potential benefits, the recent case of *Reed* v. *Reed*, 404 U.S. 71 (1971), clearly states that such a basis is constitutionally insufficient.[1] In *Reed* the statute gave a mandatory preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate. The clear objective of the provision was to avoid hearings on the merits when persons of different sex, but otherwise equal entitlement, sought to be administrator of an estate. In rejecting the sufficiency of the argument of administrative convenience the Court replied:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question,

[1] Although *Reed* involved a state statute and was decided on the basis of the Equal Protection Clause of the Fourteenth Amendment, there is no doubt that the analysis used in that case is applicable here. *See Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969), *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

> however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; . . . Id. at 76.

The basic message which comes from this case is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. Rather, whatever governmental benefit that can be supposed should be balanced with the impact upon the subject class and the arbitrariness of the classification.

The majority contends that to grant plaintiffs the relief they seek, that is to end the requirement that women demonstrate their spouses' dependency in fact, would dictate the complete abandonment of the congressional scheme for the extension of benefits.

This conclusion is simply incorrect since plaintiffs wish to change only a part of the scheme. Those provisions relating to the dependency of children, parents and others would remain intact. This result is far short of a complete abandonment of the statutory scheme. The severability clauses included when Titles 10 and 37 were enacted relieve this Court of the necessity of destroying the entire legislative framework in excoriating the discriminatory provisions. See Savings and Separability Provisions, Section 49 of Act August 10, 1956, c. 1041, 70A Stat. 640, and Savings and Severability Provisions, Section 12 of Pub. L. 87-649, September 7, 1962, 76 Stat. 497.

The majority seeks to minimize the impact and arbitrariness of the classification by characterizing the benefits which plaintiffs seek as a "windfall." This argument smacks of the long-discredited right-privilege dichotomy. When the Government determines to extend benefits, it must do so in a reasonable manner. *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). The attachment of a moral connotation to the benefits which plaintiffs ask adds nothing to the analysis and again begs the question.

Accordingly, I conclude that the statutes and regulations here in issue are unconstitutional and I therefore dissent.

Done, this the 5th day of April, 1972.

FRANK JOHNSON, JR.
United States District Judge

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 3232-N

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Plaintiffs,

VS.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Come now Sharron A. Frontiero and Joseph Frontiero, Plaintiffs in the above styled cause, by and through their attorney, Joseph J. Levin, Jr., and hereby give notice of appeal and do appeal to the United States Supreme Court from the order and judgment of this Court filed April 5, 1972, wherein this Court denied all relief sought by said Plaintiffs. Said appeal is taken pursuant to 28 U. S. C. Section 1253.

DONE this 26th day of April, 1972.

JOSEPH J. LEVIN, JR.
Attorney for Plaintiffs

Statutes and Regulations Involved

Title 37 U.S.C. Section 401:

Definitions

In this chapter, "dependent", with respect to a member of a uniformed service, means—

(1) his spouse;

(2) his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent on the member) who either—

(A) is under 21 years of age; or

(B) is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; and

(3) his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a stepparent and his stepchild is terminated by the stepparent's divorce from the parent by blood. Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 469.

Title 37 U.S.C. Section 403:

Basic allowance for quarters

(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

Pay grade	*Without dependents*	*With dependents*
O-10	$160.20	$201.00
O-9	160.20	201.00
O-8	160.20	201.00
O-7	160.20	201.00
O-6	140.10	170.10
O-5	130.20	157.50
O-4	120.00	145.05
O-3	105.00	130.05
O-2	95.10	120.00
O-1	85.20	110.10
W-4	120.00	145.05
W-3	105.00	130.05
W-2	95.10	120.00
W-1	85.20	110.10
E-9	85.20	120.00
E-8	85.20	120.00
E-7	75.00	114.90
E-6	70.20	110.10
E-5	70.20	105.00
E-4 (over 4 years' service)	70.20	105.00
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than 4 years' service), E-3, E-2, or E-1 is considered at all times to be without dependents.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (g) of this section, a commissioned officer without dependents who is in a pay grade above pay grade O-3 and who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For the purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

(d) A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if,

because of orders of competent authority, his dependents are prevented from occupying those quarters.

(e) Notwithstanding any other law (including those restricting the occupancy of housing facilities under the jurisdiction of a department or agency of the United States by members, and their dependents, of the armed forces above specified grades, or by members, and their dependents, of the Environmental Science Services Administration and the Public Health Service), a member of a uniformed service, and his dependents, may be accepted as tenants in, and may occupy on a rental basis, any of those housing facilities, other than public quarters constructed or designated for assignment to and occupancy without charge by such a member, and his dependents, if any. Such a member may not, because of his occupancy under this subsection, be deprived of any money allowance to which he is otherwise entitled for the rental of quarters.

(f) A member of a uniformed service without dependents who is in pay grade E-4 (four or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, when he is not assigned to quarters of the United States.

(g) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty". Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 470; Pub.L. 88-132, §10, Oct. 2, 1963, 77 Stat. 216; Pub.L. 89-718, §§49 (a) (1), 54, Nov. 2, 1966, 80 Stat. 1121, 1122; Pub.L. 90-207, §1(3), Dec. 16, 1967, 81 Stat. 651.

Title 10 U.S.C. Section 1072:

Definitions

In sections 1071-1085 of this title:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service.

(2) "Dependent", with respect to a member or former member of a uniformed service, means—

(A) the wife;

(B) the unremarried widow;

(C) the husband, if he is in fact dependent on the member or former member for over one-half of his support;

(D) the unremarried widower, if, because of mental or physical incapacity he was in fact dependent on the member or former member at the time of her death for over one-half of his support;

(E) an unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) has not passed his twenty-first birthday;

(ii) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; or

(iii) has not passed his twenty-third birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the Secre-

tary of Defense or the Secretary of Health, Education, and Welfare, as the case may be, and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; and

(F) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

Title 10 U.S.C. Section 1076:

Medical and dental care for dependents: general rule

(a) A dependent of a member of a uniformed service who is on active duty for a period of more than 30 days, or of such a member who died while on that duty, is entitled, upon request, to the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a dependent of a member or former member who is, or was at the time of his death, entitled to retired or retainer pay, or equivalent pay, except a member or former member who is, or was at the time of his death, entitled to retired pay under Chapter 67 of this title and has served less than eight years on active duty (other than for training) may,

upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(c) A determination by the medical or dental officer in charge, or the contract surgeon in charge, or his designee, as to the availability of space and facilities and to the capabilities of the medical and dental staff is conclusive. Care under this section may not be permitted to interfere with the primary mission of those facilities.

(d) To utilize more effectively the medical and dental facilities of the uniformed services, the Secretary of Defense and the Secretary of Health, Education, and Welfare shall prescribe joint regulations to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1447.

Department of Defense Military Pay and Allowa Entitlements Manual, Sec. 30242. Dependents of Female Member

a. *Husband.* The law does not recognize the husban a female member as a dependent for BAQ entitlement less he is physically or mentally incapable of self-supp and is in fact dependent upon her for more than one- of his support. His monthly income must be less, and monthly contribution more than one-half of his aver monthly expenses. The usual household expenses (such rent, or if they own their own home, real estate ta mortgage payments, cost of operating the family car, e constitute joint expenses and are divided equally betw them. Only unusual personal expenses, such as medi actually and necessarily incurred by the husband, are c sidered as individual expenses. A female member who untarily assumes support of her husband to permit h to attend college, although he is physically and menta capable of self-support, is not considered to have a husb who is in fact dependent on her for over one-half of h support.

b. *Child.* A female member is entitled to BAQ for minor child only when the child is in fact dependent up her for over one-half of his support.

c. *Other Dependents.* Conditions of dependency of child over 21 years of age or a parent are the same as f a male member.

d. *Determinations of Dependency.* Determinations co cerning dependents of female members are made by t authorities designated in Table 3-2-1 or 3-2-2.